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Promotion of truth, justice, reparation and guarantees of non-recurrence

Note by the Secretary-General*

The Secretary-General has the honour to transmit to the members of the General Assembly the report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, in accordance with Human Rights Council resolution 27/3.

* The present report was submitted after the deadline, in order to include the most recently available information.

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Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence

Summary

In the present report, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence addresses the issue of national consultations on the design and implementation of transitional justice measures. The report is to be read in conjunction with the report of the Special Rapporteur on participatory mechanisms and transitional justice (A/HRC/34/62).

The present report addresses preconditions for the success of national consultations on transitional justice mechanisms, their operational challenges and their contribution to the legitimacy of transitions. In relation to the first issue (security), effective and legitimate consultations require that participants feel confident that they can contribute to the process without endangering their safety; consultations must be free of coercion, threat and (implicit) reprisals. With respect to the second precondition (inclusiveness), one of the main aims of consultations is to elicit the views of, and thereby include, those most affected by past violations and abuses, hence individuals who are rarely ever consulted, such as various victims and groups that have been subject to multiple forms of victimization, discrimination and marginalization. As a third precondition, the report stresses the importance of capacity-building prior to the conduct of the consultations.

Regarding the operational challenges and opportunities, the analysis underscores the critical issue of the timing of consultations. Ideally, they should take place before the conceptualization and design of transitional justice measures. However, since transitional justice measures also depend upon the calendar of other key political and legal processes, such as constitutional reforms, the ideal timing is not always possible. The report provides some suggestions about how to address the corresponding challenges. The report also underscores the importance of establishing an entity in charge of the consultations that is objective and unbiased so that it can act impartially in relation to crucial dimensions of consultation processes, including the selection of the participants, the determination of the agenda, methodology, venues and reporting.

Regarding the potential contribution of national consultations to legitimacy, the conduct of such consultations is in itself an act of recognition, which is one of the basic aims of transitional justice measures. People whose rights have been systematically trampled are now being called upon to express their views in the design of mechanisms to redress exactly those violations and abuses. Consultation processes with victims, in particular, send them and society at large a powerful message of inclusion and ultimately empowers them as rights holders.

National consultations are not one-off events, but require more systematically the establishment of ongoing processes of communication among different constituencies. This dynamic conception of consultations can take advantage of learning processes and enables a transmission of the changing understanding of rights, needs and measures. If they are designed with a genuine wish to strengthen relationships among constituencies and are based on shared experiences and needs on

the one hand and common values and principles on the other, consultation processes can contribute to the general strengthening of civil society which, ultimately, is essential for redress, reconciliation and hence prevention.

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I. Introduction

1. The present report is submitted by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence to the General Assembly in accordance with resolution 27/3 of the Human Rights Council.

2. The report addresses the issue of national consultations on the design and implementation of transitional justice measures.

3. While, for the past decade, national consultations have been actively promoted in the field of transitional justice, there is not much literature on the topic, nor is there a thorough comparative analysis of different domestic experiences, notwithstanding the fact that the sample of consultations is more than sufficient. The present report cannot make up that deficit. Rather, it seeks to provide an incentive for such systematic analysis and, more immediately, make the case for consultations despite the challenges that they almost invariably face.

4. The report, however, is not a "how-to guide" It does not offer a detailed description of the elements of a consultation process[1] or guidance on some of the basic issues, including financing, staffing or methodological questions that should be the subject of technical attention and expertise.

5. Consultations, like participation in general,[2] are usually defended in terms of two types of argument. The first, "epistemic" argument refers to the type of knowledge or insight the people who are consulted may produce and the positive consequences that improvements in understanding may have. On that account, consultations on transitional justice can:

(a) Increase the likelihood that transitional justice measures capture the victims' and other beneficiaries' sense of justice and their judgments with respect to what would constitute effective redress;

(b) Help to ensure a close fit between the to-be-designed measures and the expressed needs of victims on the one hand and important contextual factors such as cultural, historical and political realities on the other;

(c) Broaden the range of adequate alternatives as more ideas for effective redress are put on the table.

6. The second type of argument in defence of participation generally and of consultations more specifically are "legitimacy" arguments. On that account, consultations are important not just because of the specific contributions that canvassing opinions may make, measured in terms of "proposals" but rather, because:

(a) The process of consulting is in itself a measure of recognition of, and empowerment of, victims and helps them to gain a place in the public sphere, which may have been denied them before;[3]

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[1] See, for example, *Rule-of-Law Tools for Post-Conflict States: National consultations on transitional justice* (United Nations publication, Sales No. 09.XIV.2).

[2] See forthcoming report of the Special Rapporteur on participatory mechanisms and transitional justice (A/HRC/34/62).

[3] This report should be read in conjunction with the report that the Special Rapporteur will present to the Human Rights Council in March 2017, which will focus specifically on the issue of the participation of victims in transitional justice processes.

(b) Similarly, consultation processes may widen the circle of stakeholders in justice processes, drawing into the discussions both official and unofficial groups that previously had not been included and on whose consent and participation the success and sustainability of transitional justice measures may depend to some extent;

(c) Lastly, consultations may facilitate the identification of commonalities of experiences, values and principles among different groups, which is important for forming coalitions and consensus and is crucial in the adoption of policies on contentious issues.

7. The present report considers both types of arguments and demonstrates that while there is much room for realizing the full potential of the "epistemic" contributions of consultation processes, the "legitimacy" contributions of such processes on their own justify sustained interest, exploration and investment in respect of the topic of national consultations.

8. Having underscored the value of consultations, it must be acknowledged that successful consultation processes are not easy to implement nor are they a substitute for tangible measures to restore the right to truth, justice, reparation and guarantees of non-recurrence of affected persons and others. Consultations are certainly not a box-checking exercise; they are a form of communication between the state and society and among different parts of society. Unless they are planned carefully, resourced adequately and engaged in with the intention of serious uptake, consultations — similar to other forms of communication, especially in low-trust environments, which are typical of contexts where mass violations and abuses have taken place — can also generate expectations which, if defeated, might significantly further entrench mistrust, confirm suspicions of exclusion and, at the very least, add yet another grievance to a list that had already manifested its potential for conflict.

II. Legal framework

9. The participation and consultation of persons directly affected by the State's decision-making are recognized as a right in several international human rights treaties. United Nations human rights mechanisms, such as the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child have developed an authoritative interpretation of the relevant provisions in these instruments. The Human Rights Committee, for example, establishes that the right to participation in the conduct of public affairs covers "all aspects of public administration, including the formulation and implementation of policy at international, national, regional and local levels".[4] Consultation with indigenous people is also a component of the Indigenous and Tribal Peoples Convention, 1989 of the International Labour Organization (Convention No. 169).

10. Other instruments, such as the Declaration on the Right to Development, refer to "active, free and meaningful" participation and also state specific provisions promoting the participation of groups and individuals in decision-making processes.

[4] See General comment No. 25 (1996) (art. 25), para. 5.

11. The issue of consultations and participation has also been addressed by several special rapporteurs. The Special Rapporteur on extreme poverty and human rights developed a human rights-based framework for meaningful, empowering and effective participation of people living in poverty in the design, implementation and evaluation of policies and programmes that affect them (see A/HRC/23/36). The Special Rapporteur on the human right to safe drinking water and sanitation also provided guidance on the elements and requirements for active, free and meaningful participation at all stages of decision-making processes on water and sanitation (see A/69/213). The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people recommended that consultations take place prior to taking decisions affecting the fundamental freedoms of indigenous peoples, citing the consensus-building potential of consultations and their confidence-building function (A/HRC/12/34).

12. Regarding transitional justice, in particular, international human rights instruments and mechanisms also specifically refer to the participation of victims and civil society. The updated Set of Principles for the protection and promotion of human rights through action to combat impunity emphasizes the meaningful role of victims and other sectors of civil society in transitional justice processes (see General Assembly resolution 60/147). The Human Rights Committee, for instance, urged Canada to implement, in consultation with indigenous people, the recommendations of the Truth and Reconciliation Commission with regard to Indian residential schools (CCPR/C/CAN/CO/6). The Committee on the Elimination of Racial Discrimination expressed concern and presented recommendations to Peru relative to the delays in the implementation of the comprehensive collective reparations plan, particularly with regard to members of indigenous peoples who were victims of the armed conflict between 1990 and 2000, and the lack of proper participation by such persons in developing and implementing reparation programmes (see CERD/C/PER/CO/18-21, para. 22). Several United Nations special procedures have also addressed recommendations to States relative to the participation of and consultations with victims, victims' associations and civil society in relation to transitional justice processes, including in truth-seeking initiatives, commemoration and memorialization efforts, reparations and resettlement programmes.[5]

[5] See, for example, the reports of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on Tunisia (A/HRC/24/42/Add.1), Spain (A/HRC/27/56/Add.1), Uruguay (A/HRC/27/56/Add.2) and Burundi (A/HRC/30/42/Add.1); the report of the Working Group on Enforced or Involuntary Disappearances on Timor-Leste (A/HRC/19/58/Add.1), in which the Working Group recommended to Timor-Leste the building of places that commemorate and memorialize the events of the past, in consultation with victims and associations of victims; the report of the Representative of the Secretary-General on the human rights of internally displaced persons on Côte d'Ivoire (A/HRC/4/38/Add.2), in which the Representative stated to Côte d'Ivoire that appropriate restitution, compensation or another form of reparation to internally displaced persons should be addressed in consultation with the people most affected, the displaced persons themselves; the report of the Special Rapporteur on the human rights situation in the Sudan (E/CN.4/2006/111), in which the Special Rapporteur indicated that mechanisms for reparation and reconciliation should be adopted in consultation with the victims and civil society, in order to fully respect their human dignity; and the report of the Special Rapporteur on the situation of human rights in Myanmar (A/HRC/22/58), in which the Special Rapporteur recommended the initiation of a process of consultation with all relevant stakeholders on the establishment of a truth commission.

III. Preconditions for success

13. There is no single blueprint for effective consultations on transitional justice issues. Indeed, the term, albeit not the practice, is of relatively recent vintage. An early example of a process of deliberation about transitional justice that did not use the term "consultation" or the mechanisms that are now associated with it, but that in fact involved the function, was the long and drawn-out process of the articulation of the platform of the *Concertación*, the coalition of parties that led Chile in the democratic transition post-Pinochet. That political platform was debated among relevant constituencies for a long time and included references to the elements of a transitional justice policy that was subsequently unfurled over a period of years.[6]

14. Consultations have now been formalized in many places and special, dedicated "instruments" have come to be used for that purpose. Consultative processes can involve direct and indirect engagement, such as town halls, focus groups, face-to-face interviews and statement-taking, as well as questionnaires, group and individual submissions, polls and referendums. All such processes can be applied at the national, regional and local levels.

15. In order for consultations to be effective and legitimate, certain minimum conditions need to be satisfied. These cannot be taken for granted but must be carefully planned and guaranteed. The following is not an exhaustive list but merely sets forth some of the minimum conditions, which have proved problematic in many contexts.

A. Security

16. In order for consultations to be effective and legitimate the persons to be consulted must feel confident that they can participate in the consultations without endangering their safety. As a form of communication, consultation processes must be free of coercion.

17. In the areas most affected by violations and abuses or by conflict, a proper security assessment should be conducted to determine the prevailing climate of insecurity, fear and risks of intimidation and reprisals. Security risks can be particularly high if the alleged perpetrators or groups allegedly responsible for serious human rights violations or abuses are still present, active or have authority or control in these areas. This includes cases in which local trust in state security services has been eroded. Such a threatening atmosphere impedes the ability of participants to contribute openly regarding their experiences, needs and understanding of their rights.

18. The magnitude of the security challenge involved is demonstrated by the fate of many witness protection measures in different countries — measures that are supposed to offer protection not to large swathes of people but to relatively small numbers of particular individuals. The weaknesses of witness protection measures in general are well known (see A/HRC/31/55). In the case of national consultation processes, the objective is to enable the participation of large groups of people and to elicit from them views about issues that in many contexts are deeply contested

[6] See, for example, Elizabeth Lira, "Reparations in Chile" in *The Handbook of Reparations*, P. de Greiff, ed. (Oxford, New York, Oxford University Press, 2006).

and that lie at the heart of the origins or the continuation of conflict, including questions about responsibility, adequate remedy and redress, and effective prevention.

19. In the case of Nepal, it is reported that some political actors, fearing accountability for the violations they committed, put pressure on victims and their relatives not to participate in the consultations. Such pressure limited the range of potential participants and thus the range of possible perspectives and input.

20. In Northern Province, Sri Lanka, where there is still a heavy presence of the armed forces, concerns were expressed about the chilling effect that that presence could have on those wishing to participate in the recent consultations.

21. The context of insecurity during the consultations in Yemen seriously limited the travel and participation of external actors, including international experts on transitional justice. The expertise of external actors could have been instrumental in bringing specialized knowledge and comparative perspectives. Local United Nations staff (United Nations Development Programme (UNDP) and Office of the United Nations High Commissioner for Human Rights (OHCHR) and national actors familiar with transitional justice partially made up for the absence of international participants, and the process was enriched by the insights and indeed the courage of nationals in taking the lead in such initiatives. Nevertheless, the country was deprived of contributions that people familiar with other experiences might have made to the deliberations.

22. In Colombia, in order to mitigate some of the risks and exposure of those participating in the consultations, only persons holding a personal invitation letter from the organizers were permitted to attend the regional and national forums held in 2013-2014 in the context of the peace negotiation process. Police officers screened participants before allowing access to the forums. The presence of the police brought challenges of its own. To minimize some of them, the role of the police was limited to checking identity cards and invitations at the entrance to the premises, but no police or security agents were present inside the consultation venues. Similarly, in order to minimize security risks for those taking the floor, the press were not allowed in the forums, nor were pictures, cell phones or audio or video recording permitted.

23. Today, electronic media that allow for the "anonymization" of submissions to consultation processes may mitigate security risks to some extent. The use of such media deserves further consideration, if only as a complement to more face-to-face interactions. Electronic media of this sort involve some limitations, including the skewing of participants in favour of the computer-literate and those with access to computers, the absence of the give-and-take of live interactions and the very important potential of face-to-face interactions to uncover commonalities of principles, views and experiences, including shared experiences of pain.

24. Similarly, methodologies for grouping participants in ways that mitigate security risks, for example, by disaggregating participants so as to lower the probability of exposing victims to alleged perpetrators deserve further exploration. However, some of the above-mentioned costs pertain to these initiatives as well. Once groups are disaggregated in this fashion, the tendency is to limit the consultations to certain topics rather than others (for example, offering internally displaced persons opportunities to provide views only about those aspects of the

programme most directly related to them, consulting women only about sexual and gender-based crimes, etc.).

25. Guaranteeing coercion- and risk-free participation is one of the many challenges that transitional justice faces, given the current trend of attempting the implementation of such measures not as a means of solidifying a transition that has already taken place but of enabling transitions. Contexts in which a conflict is not fully solved and, particularly, contexts in which conflict is ongoing (for example, the Central African Republic, Mali and South Sudan) highlight the challenges of designing participatory mechanisms.

B. Inclusiveness

26. Consultations are of value provided that they manage to canvass the views of a critically broad range of stakeholders. One of the many ways in which consultations can go wrong, either through manipulation or insufficiently careful design, is by excluding, wilfully or inadvertently, those who, arguably, should be included.

27. A national consultation process, however, should not attempt to become something akin to a national plebiscite or referendum on a proposed transitional justice policy, nor the equivalent of a national poll. These are distinct processes that have different aims and methodologies, and face different constraints.

28. One of the important aims of consultations is to elicit the views of those most affected by violations and abuses, who, frequently, are seldom consulted. In most countries, this happens to include various victims groups, who are usually subject to multiple forms of victimization, discrimination and marginalization.

29. As important as the participation of victims is in the design and implementation of transitional justice measures, national consultations, for good reason, rarely target victims exclusively. Since even ambitious consultation processes are temporally bound, meant to inform processes that are finite and operate under material and other forms of constraint, the success and legitimacy of consultations depend upon targeting the right combination of participants.

30. Here again, there is no one formula to guarantee success, but it is certain that (both hidden and apparent) biases in the selection of participants undermine the credibility of the consultations. Successful consultations call for a very careful selection of groups whose participation should be secured.

31. In Colombia, the organizers of the consultations prioritized the participation of victims and victims' organizations but, additionally, identified 18 categories of groups whose participation they tried to secure. These included peasant movements, indigenous populations, afro-descendant populations, labour and business organizations, trade unions, political parties, human rights organizations, development and peace programmes, churches, academia, children and adolescents, youth organizations, lesbian, gay, bisexual, transgender and intersex organizations, minority communities (Palenqueros, Raizales and Roma), environmental organizations and the media. Gender and regional considerations were also applied across the different categories, aiming for 50 per cent representation of women and significant participation by people from different regions (an aim also served by the decision concerning the location of the consultations). Lastly, efforts were made to

achieve participation by victims of the various armed agents (not only the Revolutionary Armed Forces of Colombia and State agents, but also the National Liberation Army, paramilitaries and other criminal organizations) and by victims of different types of violations (including displacement, forced disappearance, extrajudicial executions, kidnappings, etc.) This thorough mapping of relevant constituencies and stakeholders is a crucial precondition to achieving broad representation.

32. In the consultations in Burundi (2009-2010), efforts were also made to promote the participation of specific groups, including public officials, government representatives, parliamentarians, political representatives, civil society organizations, women's groups, academics, journalists, elderly and youth organizations, persons with disabilities, churches and religious communities, displaced persons, demobilized persons, former child soldiers, widows and orphans, and sampling methods were used to equalize the chances of participation of members of different ethnic groups.

33. In the case of Bosnia, 13 basic participating constituencies were identified as main targets for consultations: victims, young people, women, religious communities, journalists, academics, the legal community, civil society organizations, veterans, artists, returnees, historians and governmental representatives at the state, cantonal and local levels.

34. The usefulness of national consultation processes as means for the identification of stakeholders that may not appear obvious but that have much to contribute not just to the design but to the implementation, and hence the sustainable impact, of a transitional justice process bears highlighting. The examples already cited illustrate this point. In addition to consulting victims, it will be important to consult those on whose insight or expertise, support, political or otherwise, and influence over public opinion, the sustainability of transitional justice measures may depend (compatible, of course, with the idea that consultations are exercises that always take place under specific constraints). Up to the present, labour unions, the business sector, minority or religious groups, indigenous peoples, displaced persons, journalists, youth organizations and new political movements have not been frequent interlocutors in transitional justice discussions; yet, they may have a lot to contribute to them. Separate consultations could also take place with judicial actors and with security sector personnel, including military and police forces, to inform them of what to expect from these processes and to ascertain their perspective. Such consultations should take place independently of consultations with participants.

35. Regardless of the final composition of the groups whose participation in the consultations should be secured, consultations must not perpetuate past patterns of marginalization of certain groups (particularly given that imbalances have themselves, in some cases, been identified as catalysts for conflict). Often-overlooked identity groups affected by violations and abuses usually include women, young people, indigenous communities, the disabled, those in extreme poverty, lesbian, gay, bisexual, transgender and intersex communities and religious, linguistic or ethnic minorities.

36. Similarly, efforts should be made to avoid the frequent overrepresentation of organizations from urban areas and predominantly favouring organizations that are already comfortable interacting with national authorities and international donors.

This is not easy to avoid. In Tunisia, for example, a country that made great efforts to formalize a consultation process for the design of its transitional justice policy, the charge was often raised that the composition of the national committee in charge of the consultations was comprised entirely of associations from the capital, Tunis.

Participation of women

37. The participation of women in consultations should be prioritized in all circumstances. Parity between men and women should be one of the basic principles for determining the composition of participants in all consultations.

38. Quotas at all levels of national consultation processes, including in the bodies tasked to design, implement and report on the consultations, should be considered. However, quotas alone are insufficient and should be matched by efforts that include the empowerment of women's rights organizations and civil society groups, the provision of training for women at all levels of the consultation process, special sessions for women only and adequate privacy and psychosocial support in discussions about stigmatizing crimes. All such efforts should be part of the planning of national consultations.

39. In the case of Colombia, 50 per cent of participants in the consultation forums were required to be women. The consultations in Bosnia, however, illustrate the limits of an approach exclusively based on quotas. While over 40 per cent of the participants in consultations and half the members of the Transitional Justice Working Group were women, the outcome of the consultations in Bosnia does not show evidence of a full integration of a general understanding of the differentiated impact of the violations on men and women.

40. The participation of women should not be limited to forums where gender-based or sexual violence have been identified as part of the patterns of violations. While participation by women is crucial in such forums, the voice and opinions of women should not be reduced to predetermined roles or preconceived perceptions related, for instance, to their condition as frequent victims of gender-based violations.

41. On the participation of and consultation with women in the context of peace negotiations and transitional justice processes and related decision-making, the Committee on the Elimination of Discrimination against Women is particularly emphatic. It has formulated specific recommendations in relation to the planning and management of resettlement, reintegration, rehabilitation and reparation programmes; recommended the adoption of temporary special measures for participation by women, including quotas; and capacity-building programmes for women.[7] The importance of the equal participation and full involvement of women in transitional justice efforts is also enshrined in the landmark Security Council resolution 1325 (2000) and subsequent Council resolutions on women and peace and security.

[7] See also Committee on the Elimination of Discrimination against Women, General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations.

Displaced populations

42. Specific challenges related to the selection of participants also arise in the context of large-scale displacements of population, including internally displaced persons and persons displaced abroad, either in neighbouring countries or more remote locations.

43. The Special Rapporteur stresses the importance of making efforts to include conflict-generated diasporas, internally displaced persons and refugees in consultations about transitional justice measures that directly concern them.

44. Displaced persons have been instrumental in pushing for transitional justice processes in many countries. Their participation can raise international awareness of the transitions and their needs and reduce divisions among groups. Furthermore, these groups can provide information that is critical (and perhaps unique) for a comprehensive account of violations and abuses.

45. The challenges of eliciting the views of displaced populations are manifold and involve overcoming logistical, security and financial constraints, among others. The difficulties, however, are not insurmountable. The views of displaced populations have been elicited, with different degrees of rigour and systematicity, from populations in refugee camps displaced by conflicts and violations occurring in Sierra Leone (1999), Afghan refugees in the Islamic Republic of Iran and Pakistan (2004), East Timorese refugees in West Timor and other parts of Indonesia (2000), Liberians in the United States of America (2006), Burundians in the United Republic of Tanzania and in Belgium (2009-2010) and Sri Lankans in different parts of the world during the long conflict in that country.

46. The Liberian Truth and Reconciliation Commission engaged with diaspora, including refugees, through the Liberian Truth and Reconciliation Commission diaspora project. Coordination with groups representing refugees started, in fact, during the peace process, when various groups facilitated the transport of refugees from camps into the country in order to advocate with the negotiating parties for an agreement. This coordination persisted during the preparatory period for the Truth and Reconciliation Commission. Liberia partnered with human rights organizations in the United States and elsewhere to facilitate the involvement of the diaspora in the statement-taking process. Notwithstanding certain hurdles, including limited resources and insufficient support from international partners, there was significant participation in the truth-telling process by people outside the country (indeed, there was no commensurate system for the participation of internally displaced persons).

C. Capacity-building

47. The level of participants' prior knowledge with respect to human rights and transitional justice concepts has an impact on the outcome of consultative processes. The Special Rapporteur recalls the importance of ensuring, prior to the consultations, general knowledge and a common understanding on the part of participants of key concepts and terms pertinent to the topics to be addressed in the consultations, including the very idea of transitional justice, the basic elements of a transitional justice policy, legal terminology relevant in human rights, such as impunity, accountability, rule of law and reparations, among others.

48. There are very few countries where relevant stakeholders, including those most affected by the violations, have this sort of knowledge ex ante. Indeed, in many countries where transitional justice measures are being tried, the notion that individuals are rights holders is only weakly institutionalized and weakly internalized. There are areas of transitional justice policymaking regarding which, even in countries with sophisticated legal systems, people do not have firm intuitions, as most discussions about massive reparations programmes reveal.

49. As discussed below, without a great deal of preparatory work in order to familiarize different constituencies beforehand with the basics of transitional justice, consultations in such settings are unlikely to have highly concrete proposals as outputs:

(a) Preparatory work carried out prior to the consultations, for instance, sharing copies of the relevant documents and legislation, disseminating information on their meaning through means appropriate to the constituencies whose participation is being sought, including pictorial, audio and video material, disseminated through accessible communication channels (local radio, television, flyers, press, etc.), with sufficient lead time in advance of the consultations, would greatly contribute to the process and increase the chances that the outcome of the consultations will address the substantive issues at stake;

(b) In addition, outreach and open communication are essential for managing expectations, which will be crucial in the design of measures relating to the redress of violations. The harms caused by the violations that transitional justice measures are intended to redress, strictly speaking, cannot be undone. Given that fact, it is particularly important to familiarize potential beneficiaries with both the potential as well as the limitations of the measures, in order to avoid unnecessary defeated expectations;

(c) The sort of capacity-building for participants in consultation processes and even organizers is one of the areas where evidently, more progress is called for. There is plenty of evidence of shortcomings that can be traced to lack of previous familiarity with the relevant concepts and mechanisms. In Yemen, prior to the consultations, transitional justice was considered a new concept for most local actors. While many civil society organizations claimed to be working on such issues, they did not necessarily share a common understanding of key concepts of human rights and traded in not only conflicting but relatively uninformed understandings of transitional justice concepts. To illustrate, the most prevalent concept of reconciliation consisted basically of the notion of "forgiving and forgetting" or "getting over" — a way of understanding reconciliation that has now been broadly superseded in transitional justice discussions. Training sessions brought the discussions closer to international standards;

(d) With respect to the consultations in Nepal, it is widely agreed that better preparation could have contributed to improving the knowledge and awareness of participants about transitional justice processes. A similar lesson was derived from the consultations in Bosnia, where one of the important challenges was precisely the relative lack of familiarity with the concept of transitional justice, both among participants and organizers. Not surprisingly, the outputs and recommendations of the consultations were not as specific as some would have hoped but rather quite general;

(e) Formal efforts to offer training in human rights and transitional justice to the staff organizing the consultations were undertaken both in Bosnia and in Tunisia. In both countries, training sessions mainly targeting organizers and facilitators were organized prior to the actual consultations. The model was similar: three-day sessions covering the basics of transitional justice were outsourced to a specialized non-governmental organization, the International Center for Transitional Justice;

(f) In a comparative perspective, it must be acknowledged that these training efforts surpassed what most countries even attempted. The formal approach of Tunisia to consultations deserves further study.[8] That said, it should be plain that even these "crash courses", which targeted mostly organizers rather than participants at large, can hardly lead to a stock of knowledge sufficient to yield highly concrete outputs;

(g) To conclude this point, if consultations are conceived primarily as vehicles for obtaining concrete inputs for the design of transitional justice measures, a great deal of that potential depends on their ability to canvass informed views. Given that transitional justice policies (nowadays expected to be informed by consultations) are needed most in places where the reality, or even the idea, of rights holders has been most diffuse, it is difficult to overemphasize the importance of integrating into the planning of consultations effective means of strengthening the specific capacities of participants in the relevant topics.

IV. Operational challenges and opportunities

A. Timing

50. The preceding considerations rest upon an intuitively appealing and perfectly defensible understanding of the proper timing of consultations in the overall process of designing and implementing a transitional justice process: consultations, ideally, should precede the design of concrete measures. The consultations themselves should include a process for setting up the lead agency and for selecting the leadership of such a body, a mapping stage identifying constituencies whose participation needs to be secured, an outreach and capacity-building plan for both organizers and participants, including the production and dissemination of relevant materials, a choice of methodologies and the organization and running of the actual consultations, followed by the production of reports and other outputs, which will become resources for the design and implementation of the transitional justice policy (all of this taking place only once security conditions are guaranteed).

51. While this ideal timing is perfectly sensible, it should come as no surprise that reality rarely affords such neatness. Indeed, the ideal abstracts from, among other considerations, the fact that transitional justice policies are never designed in a vacuum but in contexts that impose important constraints, impacting on the nature, function and timing of consultations.

[8] The overall experience of the National Dialogue has come up for criticism of various kinds. See, for example, A/HRC/24/42/Add.1, paras. 30-34. Here, the point relates to the training of one important cohort of consultation, namely, organizers.

52. To begin with, some temporal constraints are unavoidable: consultations need to keep pace with political processes whose calendars are not infinitely flexible and that cannot always be adjusted to the needs of a perfect consultation.

53. Quite aside from the fact that a good number of transitions come about unexpectedly, as a result of more or less contingent events (for example, the transition in Tunisia and the transformations that it brought forth, in turn, in the region as a whole), once a transition starts, there are processes to which consultations have to accommodate, rather than the other way around.

54. To illustrate the point, some of the challenges faced by the national dialogue process in Tunisia are attributable to the time pressure imposed by a political calendar related to the drafting of the new constitution and the organization of new elections. The interest of the Ministry of Human Rights and Transitional Justice in taking advantage of the momentum, and of actors funding the consultations and training sessions, also favoured a speedy process, mainly owing to budgetary constraints. The compressed calendar had an impact on the training, hampering a better understanding of transitional justice concepts among the subcommittee members and, moreover, among participants at large. The narrow time frame may also have increased difficulties in mobilizing further participation, especially within the regions, and did not allow the time necessary for proper analysis and systematization of the results of the consultations by the National Committee.

55. This sort of time pressure is the rule, rather than the exception, again for various reasons. In 2016, the Government of Sri Lanka agreed to carry out consultations on transitional justice. Facing demands for demonstrable progress in this area, it originally gave its newly appointed Consultation Task Force a three-month deadline to design and carry out a national consultation. Notwithstanding the fact that, in the end, the deadline had to be extended, it was not feasible to adopt the sort of calendar that an ideal consultation process would have required, especially in order to allow for proper capacity-building among the potential participants in the consultation.

56. There are other powerful contextual factors that impinge not only on the calendar but also on the substance of consultations. Some transitional justice processes come about as a result of peace agreements, which determine the basic framework of a transitional justice regime, at least in theory. Any consultations that take place afterwards must remain within that pre-established framework. This does not render the consultations moot, for frameworks stemming from peace agreements will need to be further specified in many dimensions, to which consultations can contribute — quite aside from the "non-epistemic" functions that consultations can fulfil.

57. Nevertheless, the agreements will impose both temporal and other constraints that cannot be ignored. A typical example of this is the case of Burundi, where the consultations (2008-2010) took place within the framework of the Arusha Peace and Reconciliation Agreement (2000) and its subsequent developments. Thus, the questionnaires used as a basis for the consultations naturally presupposed the accountability measures mentioned in the Agreement, namely, the Truth and Reconciliation Commission and the Special Tribunal (not one or the other), along with reparations and institutional reforms.

58. There is nothing objectionable about this, for crucial questions about these mechanisms had not been settled in the Agreement, including their concrete mandates, the procedures and criteria for the selection of their members, the periods in time that should be investigated, etc. The point is that consultations rarely act as the sole fulcrum on which policy design rests and that it is therefore better to think both about their mode of operation and their essential functions in the light of this fact, a point to which this report will return in section V.

59. It is not only peace agreements that have already been signed that bind possible consultations temporally and substantively; ongoing peace negotiations have the same effect, as illustrated by the recent consultations in Colombia. In the context of the negotiation of the chapter on victims of the peace agreement, the peace negotiation table in Havana asked the United Nations and the National University of Colombia to carry out regional and national consultations in a very short time frame to coincide with the expected pace of the negotiations (three weeks to prepare the consultations and two weeks to submit the report). This time frame obviously affected not just the preparations but also the treatment that different topics could receive.

60. Greater awareness of both the importance and the conditions of success of consultations, as well as improvements in the methods employed particularly to strengthen the capacities of participants in consultations, will bring the reality of consultation processes closer to the ideal timing described above. It will normalize the view that the design of a transitional justice policy requires the contributions of diverse stakeholders, whose views must be integrated through effective means into the process.

61. The fact that there is a gap between the ideal and reality is no reason to surrender the ideal, but is a reason to redouble efforts and investments to realize the full potential of participatory methods in the design of transitional justice measures.

B. Leadership and organizational issues

62. There is no single blueprint regarding who should be made responsible for the design and the implementation of national consultations. Whatever constraints national consultations need to overcome, it should be clear that deciding who participates in a consultation, what topics are addressed, what kind of inputs participants receive, what methods to employ and what kind of outputs the consultations produce are crucial issues that play a significant role in determining the outcome of any consultation.

63. Decisions about such matters not only have an important impact on the outcome of the consultations but they determine their credibility as well. For that reason, efforts have been made to come up with ways of discharging those responsibilities that protect the integrity and independence and hence, at least procedurally, the trustworthiness of consultations.

64. Typically, but not always, an institution is officially created for that purpose (Colombia's recent consultations were co-organized, as mentioned, by the United Nations and the National University without a formal, institutional set-up). When

institutions have been set up for this purpose, their shape and composition vary across a broad range.

65. The Government of Sri Lanka officially appointed a Consultations Task Force made up exclusively of representatives of civil society, all of whom were Sri Lankan nationals. In Tunisia, the Government, through the Ministry of Human Rights and Transitional Justice, appointed a technical committee of mixed composition with 6 members and 6 deputies, including 2 members of the Ministry and 10 members belonging to five civil society organizations specializing in transitional justice. Although the selection process was not completely transparent, the final composition of the committee was widely accepted, as all the different political, religious and ideological tendencies were represented, guaranteeing a certain equilibrium and independence.

66. In Burundi, the Tripartite Steering Committee for National Consultations on Transitional Justice was established on the basis of a memorandum of understanding between the Government and the United Nations, following negotiations between them in 2006-2007 on the establishment of the Truth and Reconciliation Commission and the special tribunal for Burundi mentioned in the Arusha Agreement. The Tripartite Steering Committee had six members, equally distributed among the Government, civil society and the United Nations. On the Burundian side, ethnic and gender balance was respected. The Steering Committee was responsible for the design and implementation of consultations. It was the guarantor of the independence, integrity and credibility of the national consultations and assured the programmatic direction for the achievement of project results and the desired effects. The Government appointed the Chair of the Committee and the United Nations appointed the Executive Secretary.[9]

67. While the shape of the entity in charge of consultations cannot be determined a priori, on the basis of principle alone, but requires adjustment to contextual factors, including some political realities, the following are some relevant considerations:

(a) It is important to come up with a structure that can deflect possible charges of bias and partiality regarding any of the crucial dimensions of consultation processes, including the selection of the participants, the determination of the agenda, methodology, training, reporting, etc. All things considered, a body made up entirely of government officials (or even one with a majority of them) is unlikely to be able to do this;

(b) Consultations require the deployment of resources, a capacious infrastructure, which is difficult to create from scratch, and moreover, complex

[9] The Tripartite Steering Committee was only one part of a complicated structure, another part of which is worth mentioning, i.e., the Technical Monitoring Committee composed of representatives of the Government, civil society, donors and the United Nations. This Committee had the primary role of strategic oversight of the implementation of the project and approval of the workplans, regular performance monitoring, the settlement of any dispute that might occur and coordination between partners and other national and international actors involved in the implementation of the project. The Head of the Civil Cabinet of the President of the Republic served as national director of the overall project. He co-chaired the Technical Monitoring Committee with the Representative of the United Nations High Commissioner for Human Rights in Burundi and the Director of the Human Rights and Justice Division of the United Nations Integrated Office in Burundi.

institutional coordination (for example, security arrangements). Follow-up of the conclusions of a consultation calls for political involvement, determination and support. It is unlikely, albeit not impossible, that a body with no government representation will achieve all of this;

(c) International participation is helpful in such bodies, but neither indispensable nor, of course, a substitute for the sort of deep familiarity with context and the potential drive and sense of ownership that strong national participation can produce.[10]

68. The aim is to find a configuration that guarantees the integrity of consultations and, at the same time, their effectiveness.

V. Contributions to legitimacy

69. It would be complacent to think that the state of our knowledge about how to carry out consultation processes maximizes the contributions they can make to the design and implementation of transitional justice measures. The present report has acknowledged some of the shortcomings characteristic of consultation experiences thus far, paying particular attention to the challenges that arise from deficits in capacity-building processes. Greater familiarity with the subject matter of the consultations would obviously lead to better, more concrete and more readily usable outputs.

70. Improvements in training, better planning, greater investments and different timelines would make a difference, as would a more coherent and systematic integration of methods, both qualitative and quantitative, and of consultation forums and media in order to improve the reliability of the efforts to capture the views of participants.

71. Similarly, a better sense of how the outputs of the consultations could be articulated, presently mostly in the form of reports with an uncertain fate, could enhance the impact of consultations.

72. Lastly, at least in part because of the challenges mentioned, the idea that consultation processes are one-off opportunities should be replaced by more systematic thinking about the establishment of ongoing processes of communication among different constituencies, so as to take advantage of learning processes. Deficits in capacities of organizers and participants become particularly problematic if consultations are conceived of in terms of sporadic interactions between stakeholders whose understanding of the relevant issues remains static. A more dynamic conception of consultations that acknowledges accretions in capacities over time and establishes means for the transmission of the changing understanding of rights, needs and measures would mitigate the timing problems.

[10] International participation, not unlike the participation of national civil society, sometimes comes at a price in terms of competition and possible divisiveness; in Yemen, for example, the differences between the Office of the Special Adviser to the Secretary-General on the one hand, and on the other, the United Nations Development Programme and the Office of the United Nations High Commissioner for Human Rights over transitional justice issues were challenging. Divisions among the civil society members of mixed bodies are well known.

73. Such changes would make consultations more effective mechanisms to capture and transmit insights and proposals or, to use the terms introduced before, better epistemically, and no efforts should be spared in achieving that objective. However, there is a different set of reasons, concerning legitimacy, which also justifies an interest in consultation processes.

74. The establishment of forums and procedures in order to listen to people is, in itself, an act of recognition, which is one of the basic aims of transitional justice measures. As the Special Rapporteur has argued before, the critical sort of recognition is that which strengthens the idea and the reality of rights-holding (see A/HRC/21/46). Consultation processes with victims, in particular, send them and society at large a powerful message of inclusion and ultimately empower them. People whose rights have been systematically trampled are now given a voice in the design of mechanisms to redress those violations and abuses. They are acknowledged, indeed called for, as interlocutors, in equal standing with others, in decisions about how institutions should express a new-found commitment to the norms of a shared political project of which victims are a part. This idea can inform all aspects of the design of consultation processes, from questions of venue (accessible, safe and reassuring) to issues of conversational dynamics (non-hierarchical, respectful and symmetrical). This process helps victims to become visible and to acquire a space in the public sphere, which they did not have before.

75. Consultation processes, especially those that make systematic efforts to map the types of groups whose participation needs to be secured, offer the possibility of involving in discussions about transitional justice stakeholders that may have remained at the margins of such discussions. These need not be only previously marginalized and disfavoured groups; they may also be groups that either wilfully or contingently remained on the sidelines. Labour organizations, religious groups and businesses, among others, are not always active participants in discussions about transitional justice. Consultations may bring them into the fold, and ultimately, this is a crucial contribution to the comprehensiveness and sustainability of transitional justice measures, one of the aims of which is the idea of social integration or what is often referred to as reconciliation.

76. The interactions that are part and parcel of a well-designed consultation process also offer the potential for stakeholders to identify common grounds; they can come to an understanding of shared experiences (including shared experiences of pain and harm), shared needs (for various forms of support, security and responsive institutions) and shared basic values and principles.

77. In previous reports, the Special Rapporteur has both argued and documented the way in which transitional justice measures have as an initially unintended but invariably documentable effect the articulation of social groups; in all countries where transitional justice becomes part of the agenda, a plethora of civil society organizations form in order to advocate around those issues. Consultation processes, if designed with an eye to this phenomenon, can contribute to the general strengthening of civil society, which is ultimately essential both for redress and for prevention (see, for example, A/HRC/30/42).

VI. Conclusions and recommendations

Conclusions

78. The need to design transitional justice measures in consultation with victims and other relevant stakeholders has become a sort of "mantra" during at least the past 10 years. The frequency with which the claim is made has not been matched by efforts to systematize analysis, especially in a comparative perspective, of the actually plentiful and, in some cases, sophisticated national experiences with consultations about the topic. This has deprived the field of the many benefits that come from a conscious and deliberate accretion of knowledge and expertise, leading to various inefficiencies, including the need to "reinvent the wheel" with each new experience, the likelihood of repeating avoidable mistakes and a failure to anticipate difficulties and, consequently, develop strategies to cope with challenges that would otherwise be readily identifiable and for which a range of solutions could be considered.

79. The present report has identified some basic preconditions for the success of national consultations on transitional justice mechanisms, selected operational challenges and the contribution that consultations can make to the design and implementation of transitional justice policies. Consultations, like participation more generally, can be defended from two standpoints: first, consultations can both improve the quality of information on the basis of which design questions can be tackled and broaden the range of alternatives that should be considered. This is an "epistemic" defence of consultations. A second kind of argument focuses not on informational and propositive considerations, but on the contributions that consultations can make, in process terms, as a vehicle for offering recognition to victims, to strengthening the idea of rights-holding, to identifying stakeholders not typically included in discussions about transitional justice and, ultimately, to facilitating processes of social integration. These are "legitimacy" arguments.

80. The report has focused on some preconditions for the success of consultations that many countries have found challenging to meet: specifically, guaranteeing security conditions that allow for coercion-free participation; enabling the participation of a sufficiently inclusive set of stakeholders; and offering means to strengthen the capacity of participants such that the consultations do not consist in an exercise that captures only relatively uninformed opinions. The report has provided information about how various countries have attempted to meet those challenges.

81. Regarding operational challenges, the report has paid particular attention to issues relating to the timing of consultations and of the institutional set-up that would safeguard the integrity, independence and reliability (in the sense of fidelity to the views expressed) of consultations. Ideally, consultations should precede the work of designing transitional justice options, and the actual consultations themselves should rest upon the thorough and effective capacity-building not just of organizers and of participants. Furthermore, the consultations should take place under the responsibility of bodies that by design and operation are capable of securing their integrity, independence and reliability.

82. It is easy to find fault with many consultation processes on these scores; consultations have rarely been adequately folded into the processes leading to the design and implementation of transitional justice measures. Moreover, none of them can be said to have fully met the immense challenges associated with increasing, in the short run, familiarity with the relevant concepts and alternatives so as to allow them, reliably, to lead to concrete proposals and other outputs that are readily usable in policymaking. The report, however, has provided information about efforts that have been made in that direction and about some of the institutional forms that have been adopted in order to safeguard the integrity and independence of consultations.

83. Lastly, after providing analyses intended to help enhance the epistemic contribution of consultations, the report has emphasized the importance of the "legitimacy" contributions of such processes, recalling the crucial function that consulting victims and others can fulfil in shoring up their status as rights holders, their ability to identify stakeholders that may otherwise be left out of discussions about the design and implementation of transitional justice measures — notwithstanding the significance of their contribution to a sustainable transitional justice policy — and their role in aiding processes of social integration by helping different sectors to identify shared experiences, needs, values and principles.

Recommendations

84. **On the basis of the aforementioned conclusions, the Special Rapporteur makes the following recommendations in relation to the main challenges identified in the present report:**

(a) **Sustained efforts should be made to undertake systematic comparative analysis of national consultation processes on transitional justice so as to capitalize on a significant stock of a range of past domestic experiences. This would enable greater efficiency in the planning of consultations and in the deployment of resources and, without veering towards formulaic approaches, avoid the tendency to think that every aspect of consultations needs to be designed for each new transition from scratch;**

(b) **Since different entities within the United Nations system have contributed to or supported a significant number of national consultation processes, gathering system-wide expertise in an institutionalized manner could greatly enhance understanding and the identification of good practices. OHCHR, UNDP and the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), for example, should be encouraged to cooperate in the production of systematic analysis of their experiences. The World Bank and other relevant international financial institutions, which have expertise in development-related consultations, should be invited to collaborate in such endeavours;**

(c) **The success of consultation processes depends upon a broad variety of factors. The present report has focused on three in particular (although there are many others, including adequate financial and technical support, which should neither be ignored nor underestimated). The first basic precondition relates to security concerns. National authorities as well as international and regional actors have an important role to play, particularly in post-conflict and weakly institutionalized settings, in guaranteeing conditions**

of coercion-free participation. Greater familiarity with the role and impact that different protection schemes may have in consultation processes, as well as the use of methods and technologies that mitigate risks (including through the "anonymization" of submissions) should be encouraged;

(d) The second precondition for the success of consultation processes is to identify a sufficiently inclusive range of stakeholders whose views need to be canvassed in any credible consultation. To that end, careful mapping of the various sectors of society throughout the country that should be a part of consultations must be an essential part of early planning processes;

(e) The participation of different victims groups and of other sectors that have been traditionally marginalized must be one of the aims of such mapping exercises. In particular, no effort should be spared in securing the participation of women and of both internally displaced and refugee populations. Quotas to guarantee equitable participation of women should be established. Lessons should be derived from previous experiences in consulting victims and other stakeholders beyond national borders and should be integrated into the planning of all consultations in contexts that have generated significant displacements;

(f) There is no other issue regarding consultations that calls for more attention than strengthening familiarity with, knowledge of and capacities regarding all aspects of transitional justice and even general human rights and international humanitarian law on the part of both organizers of, and participants in, consultations. On this topic, the gathering of previous experiences will help but, most likely, will be insufficient. Therefore, this is an issue that urgently calls for greater attention so as to strengthen the ability of domestic, regional, international and bilateral actors to devise targeted capacity-building endeavours;

(g) Greater integration of consultation processes into the overall design of transitional justice policies will mitigate some of the tensions around questions relating to the timing of consultations. If consultations are a mere late "add-on", an afterthought, their links to ongoing processes and their subsequent efficiency become particularly problematic. Acknowledging that transitions obey various and not always coherent calendars and face a diversity of constraints cannot, however, excuse bad planning;

(h) Thinking about consultation as a one-off event not only heightens difficulties regarding timing and linkages, but deprives both the design and implementation of transitional justice measures of the gradual accretion of knowledge and expertise that is manifested in all transitions. More dynamic conceptions of consultations should be adopted and institutionalized. The aim should be to establish processes that allow for efficient ongoing communication among different stakeholders;

(i) The institutions in charge of consultations deserve greater attention and more thorough study. Here also, there are lessons to be derived from earlier experiences, although none should be used as a blueprint. The aim is to design institutional set-ups that can guarantee the integrity, independence and reliability of consultations and that offer a reasonable expectation that they will

make an effective contribution to the complex institutional coordination that consultations require and improve the chances of the uptake of their recommendations;

(j) Greater attention should be paid to the "legitimacy" contributions that consultations can make, and means of enhancing and solidifying those contributions should be incorporated. In particular, consultations can be one important means of offering recognition to victims, especially as rights holders; they can broaden the range of groups that see themselves and are seen by others as significant stakeholders in discussions about transitional justice and hence the future of the respective society; and, lastly, they can contribute to processes of social (re-)integration and reconciliation by allowing for opportunities to identify common experiences, needs and shared values and principles. The planning of consultations should adopt effective prospective means that are adequate for the achievement of those ends.